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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. KATHERINE KEALOHA, et al., Defendants.	Case No. 17-CR-00582-JMS UNITED STATES' MOTION *IN LIMINE* TO ADMIT EVIDENCE OF MOTIVE TO FRAME GERARD PUANA

I.

INTRODUCTION

The United States hereby moves *in limine* for an order admitting evidence of a motive for framing Gerard Puana – namely, the Kealohas' true (and dire) financial situation and prior interrelated financial fraud. This evidence is relevant and critical

for contextualizing the Kealohas' actions in framing Gerard Puana for a crime he did not commit. In short, Gerard and Florence Puana's civil lawsuit posed a serious risk of exposing the Kealohas' interrelated financial misdeeds, which funded their make-believe public image. The stakes were high: if the Puanas were not silenced, the Kealohas' entire house of cards could come crashing down.

Without the underlying evidence of financial distress and fraud, the United States would be forced to tell a story missing its formative chapters. Indeed, that is precisely what occurred at the prior civil trial involving Katherine Kealoha and Gerard Puana. The civil jury knew nothing about the Kealohas' true financial situation. That allowed K. Kealoha to falsely portray herself as a gainfully employed pillar of justice; a motiveless victim of a so-caricatured deadbeat criminal leech.[1] As explained below, that picture could not be further from the truth.

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[1] For example, here is a portion of K. Kealoha's counsel's opening statement:

> She spent her entire life working for what she got. She worked two, three jobs many times. When she was in high school she took the bus at 4:30 every morning to go to Midpac. And, the only way she was able to get up a little bit later was when she got a job and she was able to buy a car. She paid her way through law school. . . . She now works as a prosecutor basically in the division where she seeks justice for victims of sex crimes. You'll see that she's helpful to her family and to her friends to a fault. And that is what got her into trouble in this case.
>
> On the other side of the equation is Gerard Puana, a man with a very checkered past, a spotty work history, the youngest of nine children, . . . for years receiving disability income, drug problem, living with his mother 50 years old constantly borrowing from his mother[.]

Exhibit 1 at 4-5.

Although this Court previously severed the charges associated with some of these financial misdeeds, the evidence of the Kealohas' true financial situation and prior fraud is nonetheless admissible at this trial. This is because such evidence is (1) in part, direct proof of the charged conspiracy that was designed to discredit Gerard Puana; (2) inextricably intertwined with other evidence of that conspiracy; and (3) evidence of the defendants' motive, knowledge, and absence of mistake under Federal Rule of Evidence 404(b).

II.

RELEVANT BACKGROUND

There are three primary segments of prior financial misfeasance: stealing from Ransen Taito and his sister (A.T.); stealing from Gerard Puana and Florence Puana; and defrauding multiple financial institutions. These segments all occurred simultaneously. Beyond overlapping in time, each segment directly collides with the others: K. Kealoha took money belonging to the Taitos and gave it to Gerard; she took money from Florence and gave it to Ransen; the Kealohas used the Taitos' money to consummate their bank fraud; and K. Kealoha wielded her fake persona, "Alison Lee Wong," to help deceive her way through all three schemes. The Kealohas' web of lies were inextricably linked. That is why they so viciously targeted Gerard Puana and Florence Puana, two of the only people capable of revealing the truth.

1. *K. Kealoha, as guardian, steals more than $140,000 from two children*

In 2003, a medical malpractice lawsuit settled for $1.25 million dollars. As part of that settlement, the Hawaii state court appointed K. Kealoha as trustee for two minor children (Ransen Taito and A.T., then ages 11 and 9). The state court ordered that individual trust accounts be established for the children's shares of the settlement ($83,884 each). According to the court order, K. Kealoha and James Bickerton—her co-counsel on the matter—were both required to authorize all disbursements from the trust accounts. Instead, K. Kealoha omitted Bickerton and his firm from the disbursement process entirely. She instead opened individual trust accounts in her name alone as trustee, with the children named as beneficiaries.

In 2011, once Ransen turned 18, the Bickerton firm, unaware of the deception, contacted K. Kealoha about closing the guardianship. For the next nine months or so, K. Kealoha concealed from Bickerton the truth about the children's trust accounts. In one email from September 2011, Bickerton wrote, "It has been a while since I asked for the authorizations to allow me to get info from the bank for both the Ransen acct and the [A.T.] account. What is the hold up? You are making me nervous." Four weeks later, K. Kealoha responded, "I'm not sure how much exactly you were told but I have been out on medical leave." K. Kealoha further stated she

"plan[ned] on meeting with Alison [Lee Wong][2] on Thursday morning to go over the documents that Ransen dropped off[.]"

Bickerton responded less than an hour later, again indicating he "need[ed] authorization for the bank to show me all records on the account that I was supposed to be a signatory on. . . . Can you help me expedite that." After receiving no response, on September 30, 2011, Bickerton sent a followup message:

> If I don't get a signed authorization by October 4, I will have to conclude that there is a real problem there and bring it to the attention of the Court. I was supposed to be a signatory on that account with full access to the information. That is what the court order required. You opened it without me, contrary to the court order. Now that I know that and further that I am not being told simple info about the account, I have no choice but to advise the court. I do not want to be [i]n violation of the court order and must protect the record even if Ransen now has the funds. And of course, if he does not have the funds I need to find out whether he ever got them and if not why not.

In May 2012, after still not receiving the required information from K. Kealoha, Bickerton advised her: "I need to hear from the two children directly that

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[2] As alleged in the indictment, Alison Lee Wong is not a real person; that is one of K. Kealoha's aliases. During K. Kealoha's back and forth with Bickerton, "Wong," masquerading as a legal assistant—but really K. Kealoha in disguise—e-mailed Bickerton to seek to assure him that the guardianship accounts were being taken care of.

Notably, in 2008, when K. Kealoha was being considered for appointment to the Director of Hawaii's Office of Environmental Quality Control, "Alison L.Y.F. Wong" submitted an e-mail in support of K. Kealoha to the Senate's Committee on Energy and Environment (stating she had known K. Kealoha "for over nine years"). This fraudulent letter was similar in content, style, and form to other conspicuous recommendation letters allegedly submitted by Gerard Puana, Maile Simpson (K. Kealoha's niece), and Co-defendant Minh-Hung "Bobby" Nguyen (Maile's then husband).

they have been paid in full and the amounts they received. Please follow up on this promptly. If I don't hear back from you this week, I will assume the worst (that the children did not get their money) and proceed accordingly." (parenthesis in original).

Bickerton's fears of the "worst" were true. Based on available records (from 2009 onwards), K. Kealoha made numerous withdrawals from the trust accounts and ultimately depleted both accounts (in total, stealing more than $140,000):

Account Summary: Katherine Kealoha Trustee, Ransen Taito Beneficiary		
Beginning Balance (12/31/2008)	$73,219.63	
Cash inflow	$159.15	
Cash outflow	($73,378.78))	
Ending Balance (2/3/2012)	$0	
	Receipts	Disbursements
Interest Earned	$159.15	
Cashier's Check to Ransen		($1,000)
Cash Withdrawals by Kealohas		($5,000)
Transfers to Kealohas' Checking		($8,857.79)
Transfer to K. Kealoha's Checking		($8,940.00)
Payoff K. Kealoha's loan with American Savings Bank		($49,580.99)
GRAND TOTAL	$159.15	($73,378.78)

Account Summary: Katherine Kealoha Trustee, A[redacted] T[redacted] Beneficiary		
Beginning Balance (12/31/2008)	$76,016.59	
Cash inflow	$121.25	
Cash outflow	($76,137.84)	
Ending Balance (1/31/2011)	$0	
	Receipts	Disbursements
Interest Earned	$121.25	
Bank fees		($40.64)
K. Kealoha's VISA Card payment		($1,000)
Cashier's Check to Ransen		($1,500)
Cashier's Check to Ransen		($2,000)
Transfers to K. Kealoha's Checking		($4,000)
Transfer to Kealohas' Checking		($5,003)
Cash Withdrawals		($7,400)
Payoff K. Kealoha's loan with American Savings Bank		($55,194.20)
GRAND TOTAL	$121.25	($76,137.84)

Once the federal grand jury in this case began investigating the Taito facts, K. Kealoha manipulated the Taitos into providing false testimony before the grand jury,

Superseding Indictment ("SSI") ¶¶ 37(aaa), (bbb), (ccc), and directed them to sign false and misleading documents to support their false testimony, *id.* ¶ 37(ddd).[3]

2. *During this same time period, K. Kealoha steals from Gerard Puana and Florence Puana*

Between 2007 and 2009, Gerard Puana entrusted K. Kealoha with $70,000 cash, which was to be placed in an investment hui. K. Kealoha instead maintained control of those funds. She withdrew Puana's cash monthly from her account, which she then paid to Puana and fraudulently characterized as his "return on investment." K. Kealoha later gave Puana a debit card on the account, and instructed him he could withdraw certain amounts from the account each month. Ultimately, Puana was able to withdraw around $23,000 of his $70,000; the Kealohas spent his remaining funds.

The Kealohas' defrauding of the Puanas did not end there. In 2009, Florence Puana—K. Kealoha's grandmother, now 99 years old—desired additional funds in order to help Gerard purchase a condominium. K. Kealoha suggested that Florence

[3] Bickerton's attempts to discover the truth about the Taitos was stymied. In June 2012, Bickerton sent a letter to the Hawaii State Bar Association's Office of the Disciplinary Counsel (ODC), asking for assistance in discharging his duties to the minor children. He explained to ODC that he wanted to communicate directly with the minors to determine whether they received the money. Bickerton also left messages for Ransen, but he did not receive a response and began to believe that Ransen had been told not to talk to Bickerton.

Bickerton further explained in his letter to ODC that he was "not making a complaint yet, as there would be no malfeasance, i.e., if they got the money," then the complaint was unnecessary. However, Bickerton thought ODC should look into the matter. A representative of ODC responded by saying, "[w]e are filing this material with no further action on our part at this time. ODC cannot practice law, offer legal advice, or assist members of the bar with legal issues."

obtain a reverse mortgage on Florence's home. That mortgage funded in October 2009, totaling approximately $513,000. K. Kealoha steered those funds into a newly-formed bank account held by K. Kealoha and Florence Puana at the Bank of Hawaii ("BOH 1502"). Thereafter, $360,439 of the reverse mortgage proceeds went towards the condominium purchase. K. Kealoha had otherwise promised to make the necessary payments on the reverse mortgage. That did not happen. Instead, the Kealohas used the funds in the joint account to pay for various personal expenses, including:

Example of Payments from BOH 1502[4]	*Amount*
Sheraton Waikiki – Police Chief Induction Brunch for L. Kealoha[5]	(26,394.80)
Car Payments for Mercedes Benz and Maserati	(10,663.58)
HVAC Installation at Kealoha home	(7,800.00)
Payment to realtor[6]	(7,000.00)
Insurance Payments	(5,846.00)
Travel Expenses	(3,596.12)
Elton John Concert Tickets	(2,161.70)
Cashier's check payable to Jesse Ebersole[7]	(1,387.12)

[4] A more detailed list of purchases is contained in the Superseding Indictment, ECF No. 164 at 13-14.

[5] L. Kealoha was sworn in as HPD Chief of Police on November 25, 2009.

[6] Following the condominium purchase, the realtor initially gave K. Kealoha the bulk of the realtor's commission. But, according to the realtor, K. Kealoha later returned the commission, insisting that she did not want one penny of her grandmother's money. That seemed like a kind thing for a granddaughter to do. It was not: bank records show that the money K. Kealoha sent back to the realtor was in fact the *grandmother's money* from the joint reverse mortgage account. And the money from the realtor went directly into K. Kealoha's personal account.

[7] Ebersole has admitted K. Kealoha conspired with him to lie to the federal grand jury. *See*, *e.g.*, CR No. 18CR0094-JMS.

Paper Roses (Stationary)	(1,292.83)
Hawaiian Airlines	(1,157.48)

Additionally, as part of the condominium purchase, K. Kealoha created—without Gerard's knowledge—a living trust document in Gerard's name and made herself trustee. At the close of escrow, the condominium was transferred to this trust controlled by K. Kealoha. The first time Gerard saw this (alleged) trust document was when K. Kealoha produced copies of it during the ensuing civil lawsuit (*see infra*). Even beyond that conspicuous history, there is great reason to mistrust this document: the alleged notary was Alison Lee Wong.[8]

3. *The overlap between the Taitos and Puanas*

There is direct overlap—both in time and activity—in K. Kealoha's mishandling and comingling of the Taito and Puana money. For instance:

- To fund Puana's monthly "investment" withdrawals, on August 5, 2009, K. Kealoha deposited $800 from Ransen Taito's trust account into K. Kealoha's bank account, bringing the total balance of that account to $924.35; two days later, Puana withdrew $800 from that account, believing this to be a "return on investment."
- In K. Kealoha's effort to periodically placate the Taitos, on February 17, 2010, using Florence Puana's reverse mortgage funds in BOH 1502, K. Kealoha obtained a cashier's check (with a memo of "advance") in the amount of $2,600 addressed to Ransen Taito.
- Due to delays in funding the reverse mortgage, Puana had to agree to pay rent to the seller to keep the escrow on the condominium alive (otherwise, the sale could have fallen through, along with the reverse mortgage). So on March 20, 2009, K. Kealoha wrongfully pledged A.T.'s trust account as collateral to obtain a savings secured loan in the amount of $20,000. That same day, K.

[8] The State of Hawaii has no record of a notary by that name.

Kealoha opened a new bank account into which she deposited $12,000 of the loan proceeds. Thereafter, K. Kealoha used that money to pay some of the rent required by escrow. The Kealohas then used the remaining money obtained through the loan to pay their personal expenses.

- K. Kealoha pretended to have an assistant, or notary, named "Alison Lee Wong" when attempting to deceive the Bickerton firm, and when fraudulently creating Gerard's alleged trust.

4. *Supplemental income still required*

Even while stealing hundreds of thousands of dollars from the Taitos and Puanas, the Kealohas still required supplements to fund their lavish lifestyle. Between 2004 and 2017, the Kealohas opened and controlled over thirty separate financial accounts with various institutions. *See* SSI, ECF No. 164 at ¶ 12. Bad credit followed. Thus, in order to continue securing loans, the Kealohas turned to fraud. Between 2008 and 2016, they engaged in many fraudulent acts to convince lenders to approve various financial applications.

As an example, the Kealohas: (1) falsely pledged as collateral, or claimed as personal assets, the trust accounts owned by Ransen Taito and A.T. to secure three separate loans, *see* SSI ¶¶ 45-68; (2) submitted a forged "Residential Lease Agreement" in several loan applications to falsely inflate their monthly income, *see* SSI ¶¶ 72-73, 78; (3) called upon Alison Lee Wong to intervene (via e-mail, naturally) with a mortgage broker regarding derogatory credit associated with K. Kealoha, *see* SSI ¶ 67; and (4) submitted a forged police report to secure four separate loans, *see* SSI ¶¶ 80, 85, 90, 95. The bulk of these fraudulent acts occurred

within the timeframe as the Taito/Puana facts (e.g., January 2008, March 2009, July 2010, July 2012, March 2013, etc.).

5. *The Truth Starts Coming to Light*

Eventually, Gerard Puana and Florence Puana started to uncover K. Kealoha's fraud. For instance, Gerard tried to get money back from her to purchase a car, but K. Kealoha told him his money was "tied up in an investment." Also, K. Kealoha reneged on her promise to pay down the reverse mortgage, and, due to lack of payment, the principle balance of the mortgage grew substantially.

Accordingly, on September 10, 2012, Florence wrote a letter to K. Kealoha, stating, "As you know, I've tried again and again to talk to you by phone, offered to meet with you at any time or place . . . . You have not been truthful and have turned your back on me." Florence wrote that she was "brokenhearted" to learn of the ballooning balance on her home mortgage, and the fact that K. Kealoha had not repaid money owed to her. Florence further wrote, "with a heavy heart . . . effective immediately you are no longer my attorney and I don't want you to represent me in any matters, legal or otherwise concerning my property or my possessions[.]" Florence also instructed K. Kealoha to return to her all of the documents pertaining to the reverse mortgage and the purchase of the condominium, within a week. She informed K. Kealoha that if she did not hear from her, Florence would need "to take whatever steps necessary to legally correct this mess."

Five days later, K. Kealoha responded—harshly. She denied avoiding contact with Florence and said she had always been available to talk about the situation. K. Kealoha wrote the following (capitalizations included):

> I HAVE NEVER, WILL NEVER OR WOULD NEVER BORROW, TAKE OR EVEN REQUEST to BORROW ANY MONEY FROM FLORENCE PUANA!

She continued,

> I WILL seek the highest form of legal retribution against ANYONE and EVERYONE who has written or verbally uttered those LIES about me! They will rue the day that they decided to state these TWISTED LIES!

Sadly, K. Kealoha kept this promise of retribution.

In early 2013, Florence and Gerard hired an attorney to assist in recovering their stolen money. After a demand letter fell on deaf ears, on March 7, 2013, Florence and Gerard filed a civil complaint alleging they had been defrauded by K. Kealoha. They requested damages and relief ordering K. Kealoha to pay the full amount of the reverse mortgage and the $70,000 entrusted to K. Kealoha by Gerard.

On April 29, 2013, K. Kealoha filed a counterclaim against Florence and Gerard. She alleged that they misrepresented their need for a reverse mortgage and Gerard's ability to make monthly mortgage payments to K. Kealoha. She further claimed their lawsuit against her was an "abuse of process," designed to willfully defraud and "publicly embarrass" her.

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6. *The Solution: Silence the Truth-Teller*

Public embarrassment was not something the Kealohas could afford. They needed to maintain their carefully crafted public image. *See, e.g.*, Ka Wai Ola, *The Chief and The Attorney* (May 2010), *available at* https://www.law.hawaii.edu /sites/www.law.hawaii.edu/files/downloads/KWO1005.pdf. But their image (and future) was being seriously threatened by someone who knew the truth and was capable of making it known: Gerard Puana.[9] Moreover, as outlined above, the sliver of truth Gerard knew about the Kealohas' fraud was intertwined with it all: the Taitos, Alison Lee Wong, Bickerton, and the bank fraud. Thus, if Gerard succeeded in proving his saga, the Kealohas' entire house of cards could quickly tumble.

So, true to K. Kealoha's word, within nine months of her scathing letter, the Kealohas settled on the "highest form of legal retribution" available for Gerard: being locked away for a crime he did not commit.[10] Their desperate need to silence

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[9] The Taitos were children and oblivious to what had been done to them. And Florence was over 95 years old. Still, K. Kealoha tried to employ legal means of silencing her. In December 2014, K. Kealoha filed a petition for conservatorship for Florence. *See In the Matter of the Protective Arrangement of Florence Puana, An Incapacitated Person*, Conservatorship No. 14-1-0135 (Prob. Court, Haw., Jan. 22, 2015). The petition alleged that Florence was unable to manage her finances, impliedly because of her age, and that Gerard had "manipulated" and "co-opted" her. The petition was denied.

[10] Notably, the alleged mailbox "theft" occurred just two days after K. Kealoha was deposed in the civil lawsuit. Then, after Gerard had been wrongfully arrested and federally charged with the mailbox theft, K. Kealoha used his false arrest to discredit him in the civil lawsuit. For instance, in a motion *in limine* response in the civil case, K. Kealoha pressed to admit the mailbox theft into evidence, stating "evidence regarding the mailbox itself and its removal by Gerard Puana is directly

Gerard was palpable; indeed, the same week the Kealohas falsely identified Gerard as the mailbox "thief," K. Kealoha falsely accused him of elder abuse, fraud, and burglary. Those allegations went nowhere, because—like the mailbox "theft"—they were not true.

III.

ARGUMENT

The financial evidence discussed throughout is admissible under the pertinent rules of evidence. We will discuss each in turn.

1. *Relevance*

Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. This is a "low bar." *United States v. Lloyd*, 807 F.3d 1128, 1152 n.6 (9th Cir. 2015) (quoting *United States v. Cloud*, 680 F.3d 396, 402 (4th Cir. 2012)). "To be 'relevant,' evidence need not be conclusive proof of a fact sought to be proved, or even strong evidence of the same." *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc). All that is required is a "tendency" to establish the fact at issue. *Id.*

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relevant in this case, and provides an example of 'unclean hands' directly related to the issues for which the plaintiffs now sue." Exhibit 3 at 2. Moreover, K. Kealoha claimed that the "evidence of the mailbox incident is critical to assist in refuting the plaintiffs' claim that the defendant is 'hiding' evidence." *Id.* at 3.

The Kealohas' true financial situation and prior fraudulent conduct is centrally relevant for making sense of why (and so viciously) they targeted Gerard Puana. Their reputations, careers, and livelihood were seriously threatened by what the Puanas' lawsuit could bring to light. So they moved to silence and imprison him. This is classic motive evidence, which is "always relevant in a criminal case, even if it is not an element of the crime." *United States v. Hill*, 643 F.3d 807 (11th Cir. 2011); *see United States v. Bradshaw*, 690 F.2d 704, 708 (9th Cir. 1982) ("Although it is true that motive need not be proved under 18 U.S.C. § 1201, it is far from irrelevant. Motive is evidence of the commission of any crime."); *United States v. Daly*, 974 F.2d 1215, 1217 (9th Cir. 1992) ("A jury is entitled to know the circumstances and background of a criminal charge. It cannot be expected to make its decision in a void—without knowledge of the time, place, and circumstances of the acts which form the basis of the charge."); *United States v. Saniti*, 604 F.2d 603, 604 (9th Cir. 1979) ("Evidence that he had a $250-a-day heroin and morphine habit was properly admitted to show his motive for robbing the bank. Evidence that tends to show that a defendant is living beyond his means is of probative value in a case involving a crime resulting in financial gain.").[11]

[11] *See also United States v. Love*, No. 10CR2418-MMM, 2011 WL 1897677, at *2 (S.D. Cal. May 17, 2011) (J. McKeown, sitting by designation) ("The evidence and statements related to Love's mortgage default satisfy the requirements laid out by the Ninth Circuit and Rule 403 of the Federal Rules of Evidence. The evidence illustrates that Love was, in fact, 'living beyond his means.' Both the notice of default and Love's statement that he would lose his house on May 11, 2008

The relevance of this evidence extends to the Taito and bank fraud facts. As set forth above, K. Kealoha's theft of the Taito funds and bank fraud was largely occurring simultaneous to her theft (and cover-up of the theft) of the Puana funds. Moreover, as also outlined previously, K. Kealoha's lies and fraud all ran together—inserting Alison Lee Wong into all three running schemes (Bickerton and the Taitos, Gerard and his "trust," and her bank loan application); giving Florence Puana's money to Ransen Taito; falsely using the Taito trust accounts to obtain loans (including to obtain money to ensure Florence's reverse mortgage funded); taking Ransen Taito's money and giving it to Gerard as his "return on investment." These facts are all interrelated. And they establish why silencing Gerard was paramount: he possessed the key to unlocking the full scope of their interconnected crimes; and he was beginning to turn the key. This evidence is relevant. It is therefore admissible absent operation of some rule of exclusion. Fed. R. Evid. 402.

2. *Rule 404(b)*

Rule 404(b) does not exclude this evidence. On the contrary, it confirms the admissibility of this evidence.

First, Rule 404(b) "applies solely to evidence of 'other acts,' not to evidence of the very acts charged as crimes in the indictment." *United States v. Loftis*, 843 F. 3d. 1173, 1176 (9th Cir. 2016); *see also id.* ("As a leading treatise explains, '[o]ne

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demonstrate that Love also had 'a specific and immediate financial need' to save his home.") (citations omitted).

of the key words in determining the scope of Rule 404(b) is 'other'; only crimes, wrongs, or acts 'other' than those at issue under the pleadings are made inadmissible under the general rule.'" (quoting 22B Kenneth W. Graham, Jr., Fed. Prac. and Proc. § 5239 (1st ed. 2016)).

Second, "[e]vidence of 'other acts' is not subject to Rule 404(b) analysis if it is 'inextricably intertwined' with the charged offense." *United States v. Wells*, 879 F.3d 900, 928 (9th Cir. 2018). "This exception applies when (1) particular acts of the defendant are part of a single criminal transaction, or when (2) other act evidence is necessary to admit in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Id.* (citations, quotations, and alterations omitted). *See United States v. Lillard*, 354 F.3d 850, 854 (9th Cir. 2003) (Rule 404(b) is "inapplicable . . . where the evidence the government seeks to introduce is directly related to, or inextricably intertwined with, the crime charged in the indictment").

Third, as for actual "other act" evidence reliant on Rule 404(b) for admissibility, that is no high hurdle. Indeed, Rule 404(b) is "an inclusionary rule," rendering "other act" evidence inadmissible "only when it proves *nothing* but the defendant's criminal propensities." *United States v. Sneezer*, 983 F.2d 920, 924 (9th Cir. 1992) (emphasis added); *see United States v. Cruz-Garcia*, 344 F.3d 951, 954 (9th Cir. 2003) ("Rule 404(b) is one of inclusion, and if evidence of prior crimes

bears on other relevant issues, 404(b) will not exclude it.") (quotations and citations omitted). The inclusionary intent behind Rule 404(b) has been accentuated by the Supreme Court. *See Huddleston v. United States*, 485 U.S. 681, 688–89 (1988) ("Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence."). Admissible non-propensity purposes include establishing motive, knowledge, and absence of mistake. *See* Fed. R. Evid. 404(b)(2).

The Ninth Circuit has established a four-part test to determine whether "other acts" evidence is admissible under Rule 404(b). The evidence is admissible if it: "(1) tends to prove a material point in issue; (2) is not too remote in time; (3) is proven with evidence sufficient to show that the act was committed; and (4) if admitted to prove intent, is similar to the offense charged." *United States v. Beckman*, 298 F.3d 788, 794 (9th Cir. 2002) (citing *United States v. Murillo*, 255 F.3d 1169, 1175 (9th Cir. 2001), *overruled on other grounds by Muehler v. Mena*, 544 U.S. 93, 101 (2005)). In addition, a court "must then assess the evidence under Fed. R. Evid. 403" to determine whether its probative value is substantially outweighed by unfair prejudice. *Id.*

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a. Direct Proof of Conspiracy

First, the Kealohas' true financial situation and financial fraud—particularly as it relates to the Puana/Taito financial misdeeds—constitutes direct proof of the crimes charged. Indeed, the conspiracy charge directly invokes these facts. For instance:

- "It was part of the conspiracy that L. KEALOHA and K. KEALOHA would improperly use their authority to prevent the discovery and disclosure of their precarious financial condition and prior malfeasance involving the [Taito] Trust Accounts, G.K.P. and F.P. [Gerard and Florence]." SSI ¶ 28.

- "It was further part of the conspiracy that the conspirators would target members of the community who threatened the power and financial condition of L. KEALOHA and K. KEALOHA, including [Gerard and Florence]." SSI ¶ 29.

- "It was further part of the conspiracy that the conspirators would seek to discredit and intimidate such persons, including [Gerard and Florence], by falsely alleging that such persons had engaged in criminal activity or were incompetent." SSI ¶ 30.

Rule 404(b) is "inapplicable" "where the evidence the government seeks to introduce is directly related to . . . the crime charged in the indictment"). *United States v. Lillard*, 354 F.3d 850, 854 (9th Cir. 2003).

b. Inextricably Intertwined

Second, the Kealohas' true financial situation and financial fraud—including the bank fraud—is inextricably intertwined with the charged offense. Those underlying facts are necessary "in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Wells*, 879 F.3d

at 928. The coherent and comprehensible story is spelled out above: namely, the Kealohas' interconnected fraud explains why they targeted Gerard Puana. Without knowledge of that underlying fraud, the story does not make sense: why would two public servants—a Chief of Police and a supervisory Deputy Prosecuting Attorney—risk it all by fabricating a criminal case against a poor uncle? The story begs for a motive,[12] and the web of fraud propping up the Kealohas' make-believe public image supplies it.[13] Moreover, the Kealohas' bank fraud—i.e., their inability to legitimately obtain loans—explains why K. Kealoha crafted the intricate reverse mortgage plan for Florence Puana: it gave the Kealohas ready access to money they could not, absent fraud, acquire for themselves.[14]

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[12] As described previously, the lack of motive was the primary pitch by K. Kealoha during her civil trial against Gerard Puana. As another example, her attorney's closing argument included the following: "I just want to leave you with this thought. Again, if you step back and look at everything, who had the most to gain from this? Who had anything to gain from this? And that was Gerard. At the end of the day, what did Kathy get out of this? Nothing." Exhibit 2 at 3 (lines 3-7).

[13] The fact that "motive" is a permissible basis for admissibility under Rule 404(b) does not mean such evidence necessarily cannot be considered inextricably intertwined. *See, e.g., United States v. McNair*, 605 F.3d 1152, 1203–04 (11th Cir. 2010) ("We conclude the contested evidence was admissible for three reasons. First, the evidence was inextricably intertwined with evidence of the charged bribery offenses. Second, even if not inextricably intertwined, this evidence was relevant to show corrupt intent and admissible under 404(b). Defendant-appellants expressly argued they lacked corrupt intent and gave gifts to McNair and Swann out of friendship and good will. . . . Third, the evidence was admissible under 404(b) to show the contractor-defendants' common plan and motive.").

[14] The reverse mortgage funded in October 2009; the Kealohas' bank fraud was rampant in this time period. *See* SSI ¶ 51 (January 4, 2008; falsely certifying to American Savings Bank that K. Kealoha owned the funds in Ransen Taito's trust

Circuit caselaw supports application of the "inextricably intertwined" doctrine here. For instance, in *United States v. DeGeorge*, 380 F.3d 1203 (9th Cir. 2003), the defendant was charged with several offenses related to a fraudulent scheme whereby the defendant would purchase a yacht, inflate its value through a series of sham transactions, scuttle the yacht, then attempt to collect insurance proceeds based on the inflated value. *Id.* at 1207. In addition to allowing DeGeorge to inflate the value of his yacht, the sham transactions he entered also enabled him to obtain insurance for the yacht in the name of a different legal owner. *Id.* at 1208. Insuring the boat in a name other than his own was necessary because DeGeorge had at least three prior boat losses – one alleged theft and two alleged sinkings – for which he was fully compensated by insurance companies. *Id.* At trial, DeGeorge objected to the admissibility of evidence concerning those prior losses, but the district court admitted evidence that "three prior vessels owned by DeGeorge were insured; that he claimed the vessels were lost at sea; and that the vessels were not recovered." *Id.*

The Ninth Circuit affirmed, finding the "prior loss" evidence was inextricably intertwined with the charged offenses. Specifically, "[t]he concealment of DeGeorge's prior losses had an important factual connection to several counts

account); *id.* ¶ 59 (March 19, 2009; falsely certifying to American Savings Bank that K. Kealoha owned the funds in A.T.'s trust account); *id.* ¶¶ 67-68 (July 6 and 9, 2010; using the alias "Alison Lee Wong" to make it appear to mortgage broker that "Wong" was working to correct errors in K. Kealoha's credit report; falsely certifying ownership over assets in a Taito trust account).

contained in the indictment. The government specifically alleged that DeGeorge's scheme included sham transactions to hide his ownership of the boat and concealment of his loss history on the insurance application." *Id.* at 1220. "The jury would not have understood the relevance of the transactions and concealment without hearing at least some explanation for why DeGeorge could not obtain insurance in his own name." *Id.* Accordingly, the prior losses was necessary to "permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Id.* The Court concluded its analysis by stating, "Because we conclude that the evidence of prior losses is 'inextricably intertwined' with the charges in the indictment, we need not consider its admissibility under Rule 404(b)." *Id.* at 1220.[15]

[15] *See also United States v. Moore*, 729 F. App'x 787, 790 (11th Cir. 2018) (unpublished) ("Evidence that Moore planned to harm Roland is 'inextricably intertwined' with the five carjackings. Each carjacking, though an independent crime, was part of Moore's larger plan to get to Roland's workplace, shoot her, and then get away. Evidence that Moore had been found in Roland's bed two nights before and that he shot Roland during the spree explains why Moore committed the carjackings and was 'necessary to complete the story of the crime.'") (citing *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998) ("Evidence, not part of the crime charged but pertaining to the chain of events[,] explaining the context, motive[,] and set-up of the crime, is properly admitted if . . . [it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.") (formatting in original)).

Likewise, the Kealohas' financial situation and fraud is necessary to permit the United States here to present coherent and comprehensible—and accurate—facts regarding the conspiracy against Gerard.

c. Rule 404(b)

Finally, and independently, the underlying financial evidence and fraud is admissible under Rule 404(b). The proffered evidence is not being offered for any propensity purpose. On the contrary, as outlined throughout, the evidence principally establishes the motive for the conspiracy against Gerard. And "motive" is one of the delineated evidentiary purposes in Rule 404(b). *See United States v. Saniti*, 604 F.2d 603, 604 (9th Cir. 1979) ("Evidence that he had a $250-a-day heroin and morphine habit was properly admitted to show his motive for robbing the bank."). Other 404(b) purposes also apply, namely, knowledge that Gerard was not the person pictured in the surveillance video "stealing" their mailbox; and absence of mistake in identifying Gerard in the surveillance video as the mailbox "thief."[16]

The test for admissibility of the financial evidence is satisfied. *See generally United States v. Wells*, 879 F.3d 900, 930 (9th Cir. 2018).[17] First, the evidence "tends

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[16] For example, the underlying fraud makes it clear why—of all the people on Oahu—they misidentified *Gerard* as the culprit depicted in the surveillance video. That was not a mistake.

[17] "Applying this four-part test to evidence surrounding the 2012 letter of caution, Wells' tree collaring instances, and our catch-all category of Wells' disagreements with co-workers, we are satisfied that the district court properly admitted this evidence under Rule 404(b)(2). This evidence, as a whole, was relevant

to prove a material point in issue," as described throughout. Second, the evidence "is not too remote in time"; the charged conspiracy dates back to June 2011, *see* SSI ¶ 37, which is squarely in the midst of the financial fraud perpetrated on the Taitos, the Puanas, and financial institutions. Third, the Kealohas' true financial situation and fraud will be proven with substantial evidence, including bank records, witness testimony from those defrauded, and the fabricated trust document notarized by "Alison Lee Wong."[18]

3. *Rule 403*

Under Rule 403, a "court may exclude relevant evidence if its probative value is *substantially outweighed* by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403 (emphasis added). This rule is "an extraordinary remedy to be used sparingly because it permits the trial court to exclude otherwise

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to Wells' work environment, including his relationships with relevant co-workers and supervisors; was not too remote in time and fits within a reasonably tailored version of the Government's motive theory; and was proven through both the admission, without objection, of Wells' personnel file, as well as the testimony of the co-workers and supervisors involved in the underlying acts. On balance, the probative value of this evidence is unique in a workplace homicide trial, and we do not find that it is substantially outweighed by any danger of unfair prejudice."

[18] Evidence of Alison Lee Wong is further admissible under Rule 404(b) as K. Kealoha's modus operandi – she repeatedly calls upon this fake persona to cover-up her misdeeds. *See United States v. Gonzalez*, 533 F.3d 1057, 1063 (9th Cir. 2008) (modus operandi evidence is admissible under Rule 404(b)).

relevant evidence." *United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995) (quotation omitted).

With regard to motive evidence, the Ninth Circuit has explicitly stated that "evidence relevant to a defendant's motive is not rendered inadmissible because it is of a highly prejudicial nature. . . . The best evidence often is." *United States v. Parker*, 549 F.2d 1217, 1222 (9th Cir. 1977) (citation omitted; ellipsis in original). Instead, the function of Rule 403 is "limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000). Put another way, evidence is not "unfairly prejudicial" because it tends to prove guilt, but because it tends to encourage the jury to convict based on improper reasoning. *United States v. Dhingra*, 371 F.3d 557, 565-66 (9th Cir. 2004).

The probative value of the proffered evidence is not "substantially outweighed" by any Rule 403 concern. The financial evidence, as outlined above, is highly probative evidence of the conspiracy to frame Gerard Puana. *See, e.g., Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1344 (3d Cir. 2002) (highly probative evidence "is exceptionally difficult to exclude"). And there is no risk of "unfair" prejudice – the Kealohas' motive for framing Gerard Puana is an entirely proper

basis for the jury to base its reasoning. Nor can this evidence—critical to understanding the conspiracy—constitute undue delay or a waste of time.[19]

In the event any evidence is admitted solely under Rule 404(b), or to the extent the evidence above is admissible only as to certain parties, the Court can effectively limit any risk of unfair prejudice by giving appropriate limiting instructions. *See* Fed. R. Evid. 105; *Huddleston*, 485 U.S. at 691-92.

IV

CONCLUSION

For the reasons stated throughout, the United States' motion to admit evidence of the motive for framing Gerard Puana should be granted.

Respectfully submitted,

Dated: February 11, 2019.

MATTHEW G. WHITAKER
Acting Attorney General

ROBERT S. BREWER, JR.
United States Attorney

/s/ Colin M. McDonald
MICHAEL G. WHEAT
ERIC J. BESTE
JANAKI S. GANDHI
COLIN M. MCDONALD
Special Attorneys to the Attorney General

[19] The United States believes it can put on this evidence efficiently and within the trial length estimate previously provided to the Court.

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. KATHERINE KEALOHA, et al., Defendants.	Case No. 17-CR-00582-JMS CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Colin M. McDonald, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, CA 92101-8893.

I am not a party to the above-entitled action. I have caused service of the foregoing on all parties in this case by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 11, 2019.

/s/ Colin M. McDonald
COLIN M. MCDONALD

EXHIBIT 1

COPYING PROHIBITEDHRS 606.13/HRCP30(F)(2)CAAP 16-409 1

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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Intermediate Court of Appeals
CAAP-16-0000409
30-AUG-2016
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FLORENCE PUANA, INDIVIDUALLY, AND AS TRUSTEE OF THE FLORENCE M. PUANA SEMI-REVOCABLE TRUST, DATE SEPTEMBER 15, 1992; GERARD K. PUANA, INDIVIDUALLY, AND AS TRUSTEE OF THE GERARD K. PUANA REVOCABLE TRUST, DATED JANUARY 19, 2007, STATE OF HAWAI'I, Plaintiffs/Counterclaim Defendants, vs. KATHERINE P. KEALOHA, INDIVIDUALLY, AND KATHERINE P. KEALOHA AS FORMER TRUSTEE OF THE GERARD K. PUANA REVOCABLE TRUST, DATED JANUARY 19, 2007; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10 DOE PARTNERSHIPS 1-10 AND DOE ENTITIES 1-10, Defendant/Counterclaimant.	CIVIL NO. 13-1-0686 CAAP 16-0000409

TRANSCRIPT OF PROCEEDINGS

before the Honorable VIRGINIA L. CRANDALL, judge, presiding, on January 20, 2015.

FURTHER JURY TRIAL

APPEARANCES:

GERALD H. KURASHIMA, ESQ. For Plaintiffs/ Counterclaim Defendants

KEVIN P. H. SUMIDA, ESQ. For Defendant/

ANTHONY L. WONG, ESQ. Counterclaimant

REPORTED BY:

MARY BETH W. KUNIHIRO, RPR, HI CSR#234, CA CSR

JN:APP150120.WRK

evidence merely comprises her denials. She has denials but no documentary evidence to establish that she is entitled to use the funds in the Bank of Hawai'i joint account or any of the claims that were made against her.

And, she also has brought claims against Plaintiff Gerard Puana.

You'll find that her claims are not supported by any evidence.

Thank you for your patience and attention.

THE COURT: Mr. Sumida.

MR. SUMIDA: May I have one second.

Members of the jury, thank you.

I'm representing Kathy Kealoha and I will tell you we're very happy to be here because we get to finally, finally, tell our side of the story.

The purpose of the opening statement is to give you kind of an overview of what the case is about because you will hear witnesses out of order, you will see documents come in kind of out of order so the opening statement is our attempt to try and help you see what the whole picture looks like so you can put the evidence in as it comes in to the picture.

Now, keep in mind that we go second.

The Plaintiffs have the burden of proof that's why they have the burden of proof they get to go

COPYING PROHIBITEDHRS 606.13/HRCP30(F)(2)CAAP 16-409

first and we will get to put our case on after they put their case on.

You are judges of the facts. Your Honor is the judge of the law and that's why we stand for you when you come in and we will continue to do that throughout the course of this trial.

We will have two chances to address you directly. First, is during the opening statement today, and, finally, will be when we have our closing argument after hearing all of the evidence.

And, we are not to speak to you about the case. And, so, during the course of the trial, I ask you to please forgive us, we're not permitted -- we're not meaning to give you any offense, but, we will probably avoid you. And, if we see you, we're not going to talk to you. If we -- If you get into the elevator, we're probably not going to go in. If by mistake we go into an elevator, we're not going to even try and exchange glances because again we want to avoid the appearance of any impropriety. So, in advance, I ask you to please forgive us if we cause any offense.

Now, in the Voir Dire in the beginning part of this case when we asked questions we asked the jury a lot of questions about publicity because there has been some. And, those of you who remembered anything about the

case were able to say we're putting it out of our minds, we're going to listen to the evidence. I would only ask that for those of you now you see that now we have the press here that if in the course of listening to the evidence you begin to remember some things that you read before but you didn't remember now and if it does affect what you are thinking about the case then we would ask you please notify the bailiff to notify the court because again the parties are interested in a fair and an unbiased jury whose not affected by what they might have heard outside the courtroom.

Now, Kathy Kealoha is my client. She lived in Kahaluu. She spent her entire life working for what she got. She worked two, three jobs many times. When she was in high school she took the bus at 4:30 every morning to go to Midpac. And, the only way she was able to get up a little bit later was when she got a job and she was able to buy a car.

She paid her way through law school.

She had various other positions. She now works as a prosecutor basically in the division where she seeks justice for victims of sex crimes.

You'll see that she's helpful to her family and to her friends to a fault. And, that is what got her into trouble in this case.

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On the other side of the equation is Gerard Puana a man with a very checkered past, a spotty work history, the youngest of nine children, on disability for years receiving disability income, drug problem, living with his mother 50 years old constantly borrowing from his mother constantly.

And, then, we'll talk about Florence Puana in just a moment.

Now, our story begins when Kathy and her husband bought a house, a fixer upper in Kahala. And Rudy is one of Florence's children, that's Katherine's father. And, Rudy is a handyman so he helped to help fix up the Kahala house. And, in the course of that, he knew that Gerard Puana was not working, needed money, so, he offered to have Gerard Puana come in and do some help, some labor work multi project and some help could be given. Rudy was aware of Gerard Puana's encounters with the law and but he felt that he could get him straight and get him working.

So, Gerard Puana did come to Kathy's house and did work, he did labor work. He pulled, lifted things carried it to the dump and he did those kinds of things.

Now, the reasons Kathy did not know fully until this lawsuit Rudy didn't have much to do with his siblings up until that point except for you know family occasions, weddings and so forth. In fact, Kathy had very

STATE OF HAWAI'I)
CITY AND COUNTY OF HONOLULU) SS.
_____)

I, M. KUNIHIRO, an Official Court Reporter for the First Circuit Court, State of Hawai'i, hereby certify that the foregoing pages comprises a full, true and correct transcription of my stenographic notes taken in the above-entitled cause.

Dated this 18th day of July, 2016.

/S/M. KUNIHIRO, RPR, HI CSR#234
Official Court Reporter

EXHIBIT 2

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

FLORENCE PUANA, et al., Plaintiffs, vs. KATHERINE P. KEALOHA, et al., Defendants.	Cv. No. 13-1-0686

PARTIAL TRANSCRIPT OF PROCEEDINGS

Had before the HONORABLE VIRGINIA LEA CRANDALL, Judge presiding, on FEBRUARY 11, 2015, regarding the above-entitled matter; to wit, CLOSING ARGUMENTS.

APPEARANCES:

GERALD KURASHIMA, ESQ. — For the Plaintiffs

KEVIN SUMIDA, ESQ.
ANTHONY L. WONG, ESQ. — For the Defendants

REPORTED BY:
Jamie S. Miyasato
Official Court Reporter
First Circuit Court
State of Hawaii

Mr. Sumida.

MR. SUMIDA: Thank you, Your Honor.

I held my tongue for a month and now it's my chance. I cannot begin to describe for you the level of my outrage and my disgust at this lawsuit. This lawsuit is based upon a web of fabricated evidence and lies. It's outrageous for my client to have to suffer through this lawsuit. It's outrageous for me because it reflects badly on my profession. This is the kind of lawsuit that gives lawyers a bad name.

Some of you must have been coming into this court every day for the past three weeks wondering, where's the evidence, straining to listen to the witnesses and trying to think, what is their case? Am I missing something? And the reason you must have been thinking that is because this lawsuit is completely bogus. It's bogus. It's based upon a shifting foundation of ever-changing theories, ever-changing facts and testimony which they used to try to fit their case.

Now, before I go into all the evidence, let's make one thing very clear. This case, this lawsuit, started at the end of 2011, when they had that meeting with Carolyn at the Nioi Place property. That's where it started and we will go back there, but this will anchor our discussion.

time for rebuttal to talk about my counterclaim, if there is any need for that.

But I just want to leave you with this thought. Again, if you step back and look at everything, who had the most to gain from this? Who had anything to gain from this? And that was Gerard. At the end of the day, what did Kathy get out of this? Nothing. All she did was get back her advancements that she wanted reimbursed. And that was the end of it.

Their whole story rests upon the claim that she had to consolidate her loans. That didn't happen. Their whole story rests upon these crazy things written in the calendars. That didn't happen. All the documentary evidence here, all the witnesses who testified other than the plaintiffs themselves are consistent with Kathy's story. Her letter is consistent with her story. It hasn't changed.

That is the story that is true in this case, and that is a story you can follow to its logical conclusion. And if you do, you must hold them responsible for putting her in this bad situation. Thank you.

THE COURT: Ladies and gentlemen of the jury, we are going to take a half an hour recess at this time. While we are in recess, I remind you that you are not to

STATE OF HAWAII)
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CITY AND COUNTY OF HONOLULU)
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I, JAMIE S. MIYASATO, an Official Court Reporter for the First Circuit Court, State of Hawaii, do hereby certify that the foregoing comprises a full, true, and correct transcription of my stenographic notes taken in the above-entitled matter, so transcribed by me to the best of my ability.

Dated this 17th day of August 2015.

JAMIE S. MIYASATO, CSR #394

puana/closing

KEALOHA-13-1-0686-PUANA-004570

EXHIBIT 3

DLG

ORIGINAL

FIRST CIRCUIT COURT
STATE OF HAWAII
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Of Counsel:
KEVIN SUMIDA & ASSOCIATES
A Limited Liability Law Company

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Attorneys for Defendant
KATHERINE E. KEALOHA
incorrectly identified herein as
KATHERINE P. KEALOHA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

FLORENCE PUANA, INDIVIDUALLY, AND AS TRUSTEE OF THE FLORENCE M. PUANA SEMI-REVOCABLE TRUST, DATED SEPTEMBER 18, 1992; GERARD K. PUANA, INDIVIDUALLY, AND AS TRUSTEE OF THE GERARD K. PUANA REVOCABLE TRUST, DATED JANUARY 19, 2007,

Plaintiffs,

vs.

KATHERINE P. KEALOHA, INDIVIDUALLY, AND KATHERINE P. KEALOHA AS FORMER TRUSTEE OF THE GERARD K. PUANA REVOCABLE TRUST, DATED JANUARY 19, 2007; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10 AND DOE ENTITIES 1-10,

Defendants.

CIVIL NO. 13-1-0686-03 VLC
(OTHER CIVIL ACTION)

DEFENDANT KATHERINE E. KEALOHA INCORRECTLY IDENTIFIED HEREIN AS KATHERINE P. KEALOHA'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS MOTION IN LIMINE NUMBER 3: TO PRECLUDE WITNESSES, TESTIMONY AND EVIDENCE RELATED TO PLAINTIFF GERARD PUANA'S ALLEGED THEFT OF DEFENDANT KEALOHA'S MAILBOX, PURSUANT TO HRE, RULES 402 AND 403; CERTIFICATE OF SERVICE

Hearing Date: January 12, 2015
Time: 10:00 a.m.
Judge: Honorable Virginia L. Crandall

Trial: January 12, 2015

DEFENDANT KATHERINE E. KEALOHA INCORRECTLY IDENTIFIED HEREIN AS KATHERINE P. KEALOHA'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS MOTION IN LIMINE NUMBER 3: TO PRECLUDE WITNESSES, TESTIMONY AND EVIDENCE RELATED TO PLAINTIFF GERARD PUANA'S ALLEGED THEFT OF DEFENDANT KEALOHA'S MAILBOX, PURSUANT TO HRE, RULES 402 AND 403

While claiming that evidence of Plaintiff Gerard Puana's prosecution for mailbox theft is irrelevant and prejudicial, they seek relief far more expansive than simply precluding evidence of the prosecution. Instead, they improperly seek to preclude "all evidence" relating to the mailbox theft.

First, this defendant raised the defense of "unclean hands" in the Answer, thus must be allowed the opportunity to show that plaintiff Gerard Puana is of "unclean hands." This is a central defense and the defendant must be allowed to present the defense in full.

Defendant agrees that she will not discuss the fact that plaintiff Puana is being *prosecuted* for theft of the mailbox in connection with a federal proceeding. However, evidence regarding the mailbox itself and its removal by Gerard Puana is directly relevant in this case, and provides an example of "unclean hands" directly related to the issues for which the plaintiffs now sue.

Next, a central claim in his case is that he gave defendant Kealoha some $30,000 for an "investment" by depositing the cash in her mailbox. This claim is, of course, disputed by defendant. Defendant should be entitled to question the plaintiff about the all of facts surrounding this alleged deposit into the mailbox, including when it happened, description of the mailbox, how the cash deposit was made into the mailbox, and so forth.

Second, one of the key issues in this case is the fact that the plaintiffs have produced virtually no records which pertain to their claims. The vast bulk of the records

in this case were produced by defendant, or obtained by way of subpoena upon third party institutions. The plaintiffs have conveniently used the fact of any gap in documentation, to suggest that defendant is "hiding" something. The sad fact is, however, that it is Gerard Puana who, in addition to his outright lies, has engaged in a consistent course of conduct to hide and obscure the real facts and hide the evidence. This course of conduct includes:

1) Actively hiding from his siblings the fact that his mother purchased the Greenwood condominium for him, and when discovered, tried to divert blame by concocting a story about how this was a scheme on the part of defendant Kealoha;
2) Conspiring to impersonate the defendant in an attempt to obtain, and then hide, bank documents of an account to which he was not authorized to access;
3) Removing defendant's locked mailbox, the contents of which have never turned up.

Thus, the evidence of the mailbox incident is critical to assist in refuting the plaintiffs' claim that the defendant is "hiding" evidence. There clearly are alternative explanations for any gap in evidence, including the fact that the plaintiffs themselves, especially Gerard Puana, probably took them, hid them, and/or destroyed them. In addition to disputing the plaintiffs' claims, such evidence is relevant to the plaintiffs' own "unclean hands".

Rule 404 of the Hawaii Rules of Evidence does permit evidence of other crimes, "where such evidence is probative of another fact that is of consequence to the

determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident." HRE 404(b). In the instant case, the evidence pertaining to defendant Kealoha's mailbox is probative of many other relevant facts in this case, as noted above. *See State v. Cordeiro*, 56 P.3d 692, 99 Haw. 390 (Hawaii, 2002) (evidence of defendant's use and sale of illegal drugs and defendant's threat to "shoot" witness was admissible and relevant to establish identity, motive, preparation, and plan).

For the reasons stated, defendant prays that *PLAINTIFFS MOTION IN LIMINE NUMBER 3: TO PRECLUDE WITNESSES, TESTIMONY AND EVIDENCE RELATED TO PLAINTIFF GERARD PUANA'S ALLEGED THEFT OF DEFENDANT KEALOHA'S MAILBOX, PURSUANT TO HRE, RULES 402 AND 403* be denied.

DATED: HONOLULU, HAWAII, January 5, 2015

KEVIN P. H. SUMIDA
ANTHONY L. WONG
LANCE S. AU
Attorneys for Defendant
KATHERINE E. KEALOHA
incorrectly identified herein as
KATHERINE P. KEALOHA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

FLORENCE PUANA, INDIVIDUALLY, AND AS TRUSTEE OF THE FLORENCE M. PUANA SEMI-REVOCABLE TRUST, DATED SEPTEMBER 18, 1992; GERARD K. PUANA, INDIVIDUALLY, AND AS TRUSTEE OF THE GERARD K. PUANA REVOCABLE TRUST, DATED JANUARY 19, 2007, Plaintiffs, vs. KATHERINE P. KEALOHA, INDIVIDUALLY, AND KATHERINE P. KEALOHA AS FORMER TRUSTEE OF THE GERARD K. PUANA REVOCABLE TRUST, DATED JANUARY 19, 2007; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10 AND DOE ENTITIES 1-10, Defendants.	CIVIL NO. 13-1-0686-03 VLC (OTHER CIVIL ACTION) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly served on the following attorney(s) by hand delivering same or by placing the same in the United State mail, postage prepaid on this 5th day of January 2015:

GERALD H. KURASHIMA, ESQ.
ASB Tower, Suite 1310
1001 Bishop Street
Honolulu, Hawaii 96813
Attorney for Plaintiffs

DATED: HONOLULU, HAWAII, January 5, 2015

KEVIN P. H. SUMIDA
ANTHONY L. WONG
LANCE S. AU
Attorneys for Defendant
KATHERINE E. KEALOHA
incorrectly identified herein as
KATHERINE P. KEALOHA